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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. ~~338.~~ 87

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE DIAMOND COAL AND COKE COMPANY,
A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

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(27,034.)

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Statement of the Case.

The bill of complaint was dismissed by the district court upon motion of the appellee, defendant below, which motion was grounded upon the following reasons:

(*a*) That the plaintiff has not, in or by its said bill, made or stated such a case as does or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant, or stated such a case as, in equity, entitled the said plaintiff to any relief against the said defendant; and that said bill of complaint does not contain

any facts whatsoever constituting a cause of action, either legal or equitable, in favor of the plaintiff and against the defendant.

(*b*) That it appears upon the face of, and from the allegations contained in, said bill of complaint that plaintiff's alleged causes of action, and each thereof, if any plaintiff ever had, are barred by the statutes of limitation of actions of the United States, and by the provisions of the act of March 3, 1891, chapter 559, 26 Statutes at Large, 1093. That it appears upon the face of said bill of complaint that said bill of complaint was not filed, or said suit begun, within six (6) years after the date of the issuance of the United States patents set out and described in said bill of complaint, or within six (6) years of the date of the issuance of either thereof; and no facts are stated or pleaded in said bill of complaint which, either in law or equity, excuseth the said plaintiff from filing said bill of complaint and bringing said suit within six (6) years after the date of the issuance of such United States patents, or within six years after the date of the issuance of some one thereof.

(*c*) That it appears from the allegations in, and from the face of, said bill of complaint that the said plaintiff has been guilty of such negligence and laches in the filing of said bill of complaint and bringing said suit that the said plaintiff is, and by right ought to be, now and forever estopped from maintaining or prosecuting the same against this defendant. The ruling of district court was affirmed by court of appeals.

The facts set out in said bill of complaint, and the allegations material to the discussion of the points disclosed by said motion, and intended to be presented herein, are as follows:

It is alleged that some eighteen coal cash entries of the tracts of land in controversy were made by "dummy" entrymen for the sole use and benefit of the appellee, the first of said entries having been made on February 27, 1895,

and the last thereof made on September 21, 1903, and that United States patents to said respective tracts of land were issued to such entrymen, the first of said United States patents being dated May 16, 1896, and the last thereof being dated November 16, 1903.

It is further alleged that each of said entrymen conveyed the land so acquired by him to the defendant by deed, the first of said deeds being dated February 5, 1897, and the last thereof being dated December 12, 1903. In every instance it appears that such deeds were executed either prior to the date of the issuance of the United States patent to which it related, or immediately subsequent thereto. In the case of fifteen of these entries, the deeds were executed prior to the date of the issuance of the patents; in the case of one it was executed nine months thereafter; in another, upon the same date, and in another, less than one month thereafter. In almost every instance these deeds were executed either cotemporaneously or almost cotemporaneously with the respective dates of entry, as follows:

In the Walker entry, less than one month after such date.

The Cummings entry, one day thereafter.

The Somsen entry, 36 days thereafter.

The McKean entry, one day thereafter.

The McAllister entry, one day thereafter.

The Hollingworth, Penman, Fearn, Lees, Aitken, Wanlass, Hellenthal, MacCuaig, Ellis and Alvord entries, the same day.

There is no allegation in the bill of complaint disclosing when, if at all, these deeds, or any of them, were placed upon record in the recorder's office of the county wherein these lands are situated (Tp., pages 3-10).

After alleging the contents of the several affidavits made by the entrymen, the falsity of the statements therein contained is alleged in the following language:

> "* * * all of which statements and representations were and are false and fraudulent, and were

known to said conspirators and to said entrymen respectively and to said defendant to be false, fraudulent and untrue, in this, that none of said entrymen had expended any sum of money whatsoever in developing any coal mines upon any of said lands, but, in truth and in fact, the only money that had ever been expended in that behalf had been furnished and expended by and on behalf of said defendant, *and that none of said entrymen were ever in possession of said lands or any mines thereon but on the contrary all of said lands and all mines thereon then were in the possession of said conspirators, or some of them, acting for and on behalf of said defendant,* as aforesaid, and that none of said entries or purchases respectively were made for the use or benefit of said entrymen respectively, but on the contrary each of said entries and purchases was made solely for the use and benefit of said defendant, as aforesaid" (Tp., p. 7).

The only allegations contained in the bill, touching the conduct of the defendant after the dates of the issuance of the several patents mentioned, and the diligence of the plaintiff in the discovery of the alleged frauds, are the following:

"That at all times said conspirators and said entrymen and said defendant fraudulently, unlawfully and dishonestly concealed from the aforesaid officers of the United States having authority in the premises the aforesaid fraudulent practices and the true circumstances under which said entries and purchases were made, as aforesaid, all of which has at all times been well known to and taken advantage of by said defendant; that said several frauds, fraudulent devices and misrepresentations aforesaid were known only to said conspirators and said defendant, and were perpetrated secretly and were of such a nature as to conceal themselves.

"That neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, except that on or about the month of November, 1916,

there was filed in the General Land Office of the United States at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior; that immediately thereupon and at all times thereafter the Department of the Interior of the United States and the Department of Justice of the United States have been engaged in the continuous and diligent prosecution of the work of investigating and ascertaining the true facts in the premises and in preparing and instituting appropriate judicial proceedings to enforce the rights and remedies of the plaintiff in the premises."

And it is then alleged :

"It was a part of said conspiracy and understood and agreed among said conspirators, said defendant and said entrymen, that said frauds and said conspiracy and the true facts surrounding said entries and purchases should at all times be concealed from the plaintiff, to the end and with the purpose that said plaintiff might be delayed, hindered and prevented from instituting any suit or legal proceeding for the recovery of said lands until lapse of time should enable the defendant to plead delay in the institution of said suit, but plaintiff alleges that in consideration of the premises the defendant is and should be forever estopped from setting up or alleging delay in the institution of said suit in defense thereof" (Tp., pp. 10-11).

ARGUMENT.

The decree of the district court and court of appeals is right, and should be affirmed, for the following reasons:

(*a*) That it appears upon the face of, and from the allegations contained in, said bill of complaint that the alleged cause or causes of action set out therein are barred by the statute of limitations of actions of the United States, and by the provisions of the act of March 3, 1891, chapter 559, 26 Statutes at Large, 1093, and that no *facts* are pleaded which

show the defendant to have been guilty of any concealment of the alleged frauds subsequent to the date of the issuance of the several United States patents, or any or either thereof, or of any conduct which would toll the statute and excuse the plaintiff from sooner instituting its suit for the cancellation of said patents.

(*b*) That said bill of complaint fails to state any facts from which it can be determined the time when the frauds charged in the bill of complaint, or the concealment thereof, were discovered by the plaintiff, or what the discovery was; and it is not therein alleged when said discovery was made or what it was or how it was made, and why it was not made sooner; and the court is unable to say whether, by ordinary diligence, the discovery might not have been made within a reasonable time after the perpetration of the frauds complained of.

(*c*) That it appears from the bill of complaint, as well from *that* alleged therein as *that* omitted therefrom, that the discovery of the alleged frauds ought, with reasonable diligence, to have been made within the period of the statute of limitations, and that the government had sufficient notice to require action and investigation upon its part, and failing therein, to bar its cause of action, and that there was no fraudulent concealment of the cause of action.

I.

No facts are pleaded to show the defendant to have been guilty of any concealment of the alleged frauds subsequent to the date of the issuance of the several United States patents, or of any conduct which would toll the statute and excuse the plaintiff from sooner instituting its suit for the cancellation of said patents.

The allegation contained in plaintiff's bill, hereinbefore quoted, namely: "and said defendant fraudulently, unlaw-

fully and dishonestly concealed from the aforesaid officers of the United States * * * the aforesaid fraudulent practices and the true circumstances under which said entries and purchases were made," and that said frauds "were perpetrated secretly and were of such a nature as to conceal themselves," are mere conclusions of law, and so held to be by the learned judge below. They contain no *facts* constituting concealment or which would justify the court, upon an inspection of the bill of complaint, in judicially determining that the defendant was so guilty as charged. They disclose the state of the pleader's mind and a conclusion formed therein, either without any *facts* to justify the same, or at least from *facts*, knowledge of which is carefully concealed from the court.

The concealment of the frauds might be accomplished in many and various ways, and it is for the court to say whether the conduct of the defendant constituted concealment in the legal sense, such as to toll the running of the statute and to excuse the Government from bringing the suit within the time therein limited, and likewise for the court to say whether the frauds "were of such a nature as to conceal themselves." These statements of the pleader are mere idle assertion. His conception of concealment may be entirely erroneous, and before such conception should be affirmed, the conduct of the defendant in relation thereto must be disclosed. In passing upon this point, after full argument, the learned judge below said:

> "While it is quite true that the plaintiff is never required to plead his evidence, but only ultimate facts, yet I do not think the bare allegation of concealment without more is sufficient. That is pleading nothing more than a conclusion of law. He must set out acts which constitute the concealment so that the court may say whether or not they are sufficient to excuse the plaintiff from bringing the suit within the time fixed by the statute. * * * What may appear

> to the pleader to be a sufficient concealment on the one hand and an exercise of diligence on the other to avoid the bar of the statute may not be so regarded by the court. At least it is a question for the court to determine from the facts set out in the pleading."

The case of *United States vs. Puget Sound Traction, Light and Power Company*, 215 Fed., 436, is directly in point. This was a suit to cancel a patent to public lands fraudulently obtained. It was alleged that the land was of great value as a water-power site, but of no value whatever for mineral; that the defendants pretended to make mineral discoveries upon the land, and filed fraudulent notices of mineral locations, knowing that the land was non-mineral in character and not subject to entry under the laws of the United States as such, *and that it was their intention at all times to procure the group of mining claims for the purpose of utilizing the water-power sites adjacent thereto.* That in their application for patent the false representation was made that labor had been performed and improvements made of the value of $10,000 on the claims for mineral development, and that gold and silver had been found in paying quantities, and that the land was more valuable for its mineral than for any other purpose. Upon the face of the bill the time of the statute of limitations had run since the issuance of the patents. By way of excuse for not bringing the suit within the time limited plaintiff made the following allegation:

> "By reason of the continuous character of the fraudulent acts complained of and of the continuous character of the concealment, the plaintiff has at all times herein down to the month of June, 1910, remained in ignorance of the true character of the real property described herein."

It will be noted that this allegation is quite as comprehensive as the allegation contained in the present bill of complaint. In the present bill of complaint, upon the mere

charge of "concealment" against the defendant, it is sought to excuse the plaintiff for its alleged ignorance of the fraud and its negligent standing by without investigation or discovery for a period of time extending from fifteen to twenty years. On page 438 the court said:

> "May the Government avoid the bar of the statute of limitations by a mere allegation of failure to discover the fraud upon which the action is based within the statutory period? If so, the motion should be denied. If, on the other hand, the Government must show that the failure to discover was due to a concealment of the cause of action by the other party, or at least that the fraud is of self-concealing nature, and the Government in failing to discover it was not negligent or lacking in diligence, the motion should be granted."

Again the court said:

> "There is no allegation in the complaint of specific acts of concealment by which the Government was prevented, after the consummation of the fraud, from discovering the same; nor are any facts alleged from which the court would be justified in concluding that the Government was not negligent or was not lacking in diligence in failing to make the discovery within the statutory period.
>
> "The allegation that the defendants commenced in 1905 'secretly and covertly' to construct a power plant is too vague and indefinite. The terms employed to show concealment are relative terms; and it is impossible to determine with what degree of secretiveness and covertness the work was done. What may appear to the pleader to be secret and covert may not be regarded as such by the court. In order to determine whether the work was done 'secretly and covertly,' the court should be acquainted with the facts upon which the pleader bases his conclusion that it was done in such a manner. Especially is this so when the act charged is not such as in its nature to suggest performance in a secret and covert manner.

> It is necessary that facts be stated rather than conclusions, not only so that the court may determine the sufficiency of the pleading, but also that the adverse party may know with what he is charged and how to answer it. The assertion that the work was 'secretly and covertly' done, being purely a conclusion and no facts being stated to sustain it, must be disregarded * * * The general allegation in the bill to the effect that because of the continuous character of the acts complained of, and the 'continuous character' of the concealment, the plaintiff remained in ignorance of the true character of the property until June, 1910, does not bring the plaintiff within the rule above stated. In its final analysis it is merely an allegation of ignorance at one time and knowledge at another. The fraudulent acts alleged in the complaint culminated in the issuance of the patent. The Government's right of action at that moment arose. It is a concealment of this cause of action that is the material point to the inquiry here."

Again the court said:

> "Such other general allegations as 'that each of the said fraudulent acts and representations was and is a continuous and fraudulent act, and so intended by the above-named defendants and each of them,' can neither supply the omission of specific acts nor make the acts which are alleged fraudulent or continuous acts of concealment, when they are not such in fact."

In the case of *Beatty vs. Nickerson*, 73 Ill., 605, the question of the sufficiency of plaintiff's replication to defendant's plea of the statute of limitations, was before the Supreme Court of that State. The plaintiff had replied "that the defendant fraudulently concealed from him the knowledge of any cause of action accruing in his behalf against him, the said defendant, and because he says he has lately made the discovery, and within less than five years prior to the commencement of his action, that the representations of the defendant, as charged in the first and second counts of the declaration, and the warranties charged in the third count

thereof, were false and fraudulent, to the knowledge of the defendant." The statute of the State of Illinois provided: "If a person, liable to an action, fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards." The court said:

> "The replication in question, it is claimed, meets the requirements of this statute. We do not think so, as it fails to set out the facts constituting concealment. A reference to the declaration does not supply this defect, for in that is found no allegation of concealment or of facts tending fraudulently to conceal a cause of action.
>
> "This statute must have a reasonable construction, and we think it would be productive of much wrong and injury to allow an allegation so general as in this replication, to meet the objects of the statute. *The facts constituting the fraud must be clearly stated, so that the defendant may be apprised thereof, and shape his defense.*
>
> "Laying out of view the question of the operation of this statute, whether prospective only, or otherwise, we are satisfied the replication was defective in substance, and the demurrer to it was properly sustained."

But it would seem useless to multiply authorities upon this point. Repeated adjudications have affirmed that such an allegation is a mere conclusion of law, and in our judgment removed the question from the domain of discussion or controversy.

It seems, however, to be claimed by the Government that these allegations of concealment, contained in the bill of complaint, should be construed as comprehending within their terms the charge of some fact, constituting what the Government chooses to designate as "passive concealment." Since concealment may be either active or passive, and we are not

advised by the bill of complaint of the nature or character of the concealment alleged, such assertion of the Government manifestly cannot help out the averments of the bill; and since the assertion that a certain concealment is of a passive character involves only another conclusion of law, we fail to see how the plaintiff is benefited by the contention.

The most that can possibly be claimed for the pleading in question, and the most that is claimed, as we understand it (and such a claim is without either reason or authority to support it), is that the charge contained in the bill is equivalent to an allegation that after the consummation of the frauds leading up to the issuance of the United States patents, the defendant, wrongdoer, "failed to seek out the plaintiff and voluntarily confess to it, or its officers, the wrong which had been perpetrated upon it." This assertion is without warrant in any facts set out in the bill, but even were it admitted that by fair implication the bill contained such an allegation, we confidently assert that by a long line of decisions of the Supreme and other Federal courts, beginning with the case of *Bailey vs. Glover*, 21 Wallace, 346, and ending with *Exploration Co., Ltd., vs. United States*, decided June 10, 1918, reported in Supreme Court Reporter July 1, 1918, page 571, as well as by almost universal law, such an allegation standing alone is insufficient to toll the running of the statute of limitations.

Bailey *vs.* Glover, 21 Wallace, 346.
Wood *vs.* Carpenter, 101 U. S., 135.
Felix *vs.* Patrick, 145 U. S., 318.
Bates *vs.* Preble, 151 U. S., 162.
Pearsall *vs.* Smith, 149 U. S., 231.
Linn & Lane Timber Co. *vs.* U. S., 196 Fed., 593.
United States *vs.* Exploration Co., 203 Fed., 387; 225 Fed., 854; 235 Fed., 110; and in the Supreme Court of the United States, 247 U. S., 435.
United States *vs.* Norris, 222 Fed., 16.
Keithly *vs.* Mutual Life Ins. Co. of New York, 271 Ill., 584; 111 N. E., 503.

In the case of *Bailey vs. Glover, supra*, the bill is not set out in the opinion of the court, in which it is, however, said that the bill makes a very clear case of fraudulent conspiracy to defraud the creditors, and alleges that the bankrupt and his grantees kept secret their fraudulent acts and *endeavored* to conceal them *from* the knowledge of the assignee and of the creditor, whereby they were prevented from obtaining any sufficient knowledge or information thereof until within two years before filing the bill. The opinion of the court addresses itself in general terms to a discussion of the circumstances under which the running of the statute of limitations, then under consideration, would be tolled, and suits permitted to be maintained after the time limited therein. The *decision* of the court is contained in the following language:

> "• • • in construing *this* statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him."

It should be noted that the court speaks in general terms; that the language is generic; that its exact meaning is left open for further interpretation, and that the specific character of the particular cases which fall within its terms is therefore necessarily left to future adjudications. In other words, the question, whether the fraud has been concealed, or is of such character as to conceal itself, is one which necessarily, on account of the universality of the language, was determinable only by the particular facts touching the concealment or the particular character of the fraud as disclosed in each particular case, where the rule in *Bailey vs. Glover* may be invoked; and manifestly it is improper to give this language,

when we come to concretely apply the same, a construction which "lays the axe to the root" of the statute of limitations, now under consideration, and destroys absolutely its efficacy in every case where title to public lands has been obtained by fraudulent practices, and such would be the result of holding that where the patentee has simply "failed to seek out the Government and voluntarily confess his wrongdoing" he is not entitled to its benefits. This statute of limitations can only apply to fraud and mistake. No other case can be conceived of wherein the Government would be justified in attempting, in equity, to vacate one of its patents to land. All actionable fraud is concealed, and must remain so until after the consummation of the intended wrong, and all actionable fraud is likewise of such a character as, for a certain length of time, to conceal itself. False representations made to a party who knows them to be untrue, and therefore does not and cannot rely upon the same, do not, of course, constitute actionable fraud, and every such representation must be of a character, or made in a manner, necessarily, for a time, to conceal itself in order to be effective.

That the language of the court was not intended to lead to this result, and thus destroy the efficacy of the statute, is made perfectly clear in the case of *Bates vs. Preble*, 151 U. S., 149. In this case the plaintiff was the owner of certain stocks and bonds which she kept in a safety deposit box to which her son had the key. The son took securities from the box at various times and delivered them to the defendants, who were stock-brokers and had notice that the securities belonged to the plaintiff, and they were sold. Suit was brought against the brokers to recover for the conversion of the securities, and one of the defenses was the six-year statute of limitations. The plaintiff insisted that a cause of action was not barred, because defendants had fraudulently concealed the conversion from her and she did not discover it until within six years before bringing the suit. The court, in discussing an instruction given on the subject of fraudulent concealment, said:

"We think the court erred in this instruction. It assumes that the same evidence which tended to show a conspiracy between Edward Preble and the defendants to obtain these bonds was also evidence of an intention on defendants' part to keep a knowledge of the transaction from the plaintiff. *This, however, does not necessarily follow. If it did, the result would be that whenever a party has been guilty of a fraud, which it is for his interest should not be known by the person upon whom it is committed, he would practically lose the benefit of the statute, though he may not have made the slightest effort to keep it secret.* The vice of the instruction in this particular was that there was no evidence whatever that the defendants, or either of them, said or did anything before or after the securities came into their hands, to conceal the transaction from the plaintiff."

Long after the decision in *Bailey vs. Glover, supra,* the Supreme Court decided the case last mentioned, and also the case of *Wood vs. Carpenter, supra,* the case of *Felix vs. Patrick, supra,* the case of *Pearsall vs. Smith, supra,* and the case of *Avery vs. Cleary,* 132 U. S., page 606. The court is conclusively presumed to have known the state of the law, as declared by it in *Bailey vs. Glover,* and unless it indisputably appears that these subsequent decisions are in modification of the law, as therein declared, they will be held to be in accord therewith, as they are presumed to be, and as they in fact are.

In the *Wood case, supra,* judgments had been obtained against one Carpenter for large sums of money. Carpenter, at the dates of the notes and bills, upon which judgments were obtained, was the owner of real and personal estate of the value of over $500,000. It was alleged that for the purpose of defrauding the plaintiff and others by depreciating the value of their claims against him, and of thereby inducing them to sell the claims to him for less than their face, said Carpenter, in the year 1858, entered into a fraudulent conspiracy with his brother, Alvin B. Carpenter, and others to the

plaintiff unknown, to incumber his real estate and hide away the title so that the property could not be sold to pay his debts, but in the end inure to his benefit. That in pursuance of this scheme he confessed fraudulent judgments for large sums, and afterwards made a fraudulent assignment of all his property to one Walker and one Allis, and thereafter procured the title to all his real and personal estate to be vested in his brother Alvin, and others, who held the property in secret trust for the said Carpenter. That in this way the title was so concealed that the plaintiff was prevented from levying executions issued upon his said judgments. That subsequently the plaintiff caused Carpenter to be arrested by the sheriff, in Massachusetts, upon final process. Carpenter, being taken before a master, thereupon took the insolvent debtor's oath, falsely deposing that he was not possessed of means to the extent of twenty dollars, and that he had in good faith assigned all of his property for the benefit of his creditors. From that time forward the said Carpenter falsely pretended to the plaintiff and his other creditors that he was poor, and wholly unable to pay his debts, or any part of them. Thereupon, having put his property beyond the reach of process upon the plaintiff's judgments, and procured his discharge from custody in Massachusetts, and having led the plaintiff to believe that he had no property out of which the judgments could be collected, the said Carpenter afterwards, in further pursuance of the conspiracy, pretended and represented that his son-in-law, one D. C. Keller, would purchase the judgments with his own means, and so procured the plaintiff, who acted upon the belief of the truth of the representations and of the perjured statement of the said Carpenter, to assign the judgments to Keller for fifty per cent of their principal and interest, whereas, in fact, the judgments were brought by Keller with money furnished by the said Carpenter, and they were held in trust by Keller for the said Carpenter until June 1, 1873, when Keller, at the instance of Carpenter, caused satisfaction to be entered. That the title was held in secret

trust for Carpenter by his brother Alvin and others, and was fraudulently concealed from the plaintiff until long after the assignment of the judgments. That within twelve months of the bringing of the suit the property was all reconveyed to the said Carpenter, and that the plaintiff had no knowledge of the ownership of the property by Carpenter, nor of the secret trust, nor of the falsity of his representations until during the year 1872.

The defendant Carpenter pleaded the statute of limitations, the particular statute pleaded containing the following provision: "If any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." While it is true that this statute was a statute of the State of Indiana, it is also true that it embodies the identical principle of law laid down in the *Bailey case, supra,* and only crystallizes the same into statutory form; and it is likewise true that the court, in construing said statute, and announcing the principles underlying the same, did so after a full review of the authorities from other States as well as those from the State of Indiana, and spoke not in the language of the decisions of the courts of the State of Indiana, but in the language of the universal law. The court said:

> "*A wide and careful survey of the authorities leads to these results.* The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation. *Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.* There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

In the case of *Felix vs. Patrick, supra,* the bill of complaint, after reciting the fraudulent conduct of the defendant Patrick, resulting in his having secured certain lands in his own right, but really by reason of such fraudulent conduct for the benefit of the complainant, alleged:

> "That the said Patrick never informed the said Sophia, or her husband, or any one related to her by blood, 'that he had procured and located said scrip, or that he had procured said blank instruments and filled them out, or had caused a deed to be executed conveying to himself the real estate hereinbefore described, or that he claimed any ownership therein; but, on the contrary, fraudulently concealed the same and exercised every precaution to prevent said proceedings coming to the knowledge of said parties'; that recognizing the frailty of his title, he endeavored for several years to secure the execution of a deed by the said Sophia and her husband without letting them know the character of the instrument whereby they would convey to him in fee the said property."

On page 331, in discussing the question whether the bill of complaint pleaded sufficient facts to avoid the laches which appeared upon the face thereof, the court said:

> "There is, it is true, an averment that Patrick never informed the said Sophia or her husband that he had located such scrip, but, on the contrary, fraudulently concealed the same, and exercised every precaution to prevent such proceedings coming to the knowledge of the party. But no *acts* of his in this connection are averred in the bill, and we are left to infer that *his concealment was that of mere silence,* which is not enough."

In this declaration the court was not, and could not have been, governed by the interpretations of any statute of the State wherein the land lay, but was declaring the rule in

equity upon this point as the same obtains in the courts of the United States.

Again, in the case of *Pearsall vs. Smith*, 149 U. S., 231, the court, in discussing what facts would toll the statute of limitations found in section 2 of the act of March 2, 1867, in suits between an assignee in bankruptcy and other persons, said:

> "Although this court has attached to section 5057 of the Revised Statutes (same section) a qualification, that qualification is that where relief is sought on the ground of fraud, it is necessary, in order to postpone the right of action on the part of the assignee in bankruptcy until the discovery of the fraud, that ignorance of it should have been produced by affirmative acts of the guilty party, in concealing the facts, and that there should have been no fault or want of diligence or care on the part of the person who claims the right of action; in other words, that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, or ought to have been so discovered or known."

In *Linn & Lane Timber Co. vs. United States*, 196 Fed., 593, one Smith, as appears from the findings of the court, through his agent, of whose acts he had full cognizance, and which were done upon his behalf, obtained fraudulent patents to large tracts of timber land in the State of Oregon. Thereupon, and after the issuance of United States patents to these lands, Smith formed the Linn & Lane Timber Company, a Minnesota corporation, and caused the lands to be conveyed to it by his agent, an active participant in the original fraud. However, as an officer of said corporation, he failed to put the deed upon record in the county of the State of Oregon wherein the lands were situated. Referring to

Smith and his conduct after the issuance of the United States patents to these lands, the court found as follows:

> "He organized the corporation. He owned all of the capital stock; he owned all of the lands. Before the corporation was organized and before the patents issued, he knew that the officers of the Government were making investigation of the entries, and that there was talk of his indictment by a Federal grand jury. The corporation was organized in Minnesota 'as a holding company' of lands in Oregon. Up to the time when the deeds were recorded, September 9, 1908, the corporation had never done any business, had never taken possession of the lands or exercised any act of ownership thereof, and there was nothing of *record* in any state of the county office in Oregon to indicate that the corporation possessed any property in the State or had ever transacted any business therein. There can be no doubt that one at least of the purposes for which it was formed was to conceal fraudulently therein the titles to the lands which are the subject of this suit, and to keep the titles so concealed until the time when the statute of limitations should bar the anticipated suit of the Government to set aside the patents. This is shown by the fact that the possession of the deeds which apparently were executed on June 4, 1906, May 28, 1907, and August 17, 1907, was retained by Smith, and that he withheld the deeds from record until three and one-half months after the commencement of the suit, and by the further fact that up to the date of recording the deeds the taxes on the lands were assessed against and were paid by the grantors and not by the grantee, the corporation."

Citing 20 Cyc., 446, the court said:

> "The fact that a deed is withheld from record or is otherwise concealed in a badge of fraud."

The court having ruled that "Smith was the corporation, and the corporation was Smith," held the doctrine of *Bailey*

vs. Glover to be controlling, and that the Government's cause of action was not barred by the statute of limitations.

The case of *United States vs. Exploration Co., Ltd.*, the several decisions therein which are relied upon by the learned United States attorney as establishing the doctrine contended for by the Government in this case, namely: That the mere fact that the wrongdoer "failed to seek out the plaintiff and voluntarily confess to it or its officers the wrong which had been perpetrated upon it" tolls the statute of limitations, does not even remotely sustain his contention.

The first decision of the Court of Appeals in that case, 203 *Federal*, 385, was on appeal by the Government from an order of the district court sustaining a demurrer to the bill of complaint. The question before the court, and decided by it, as stated on page 389, is as follows:

> "If the United States is defrauded of public lands by means of 'dummy' entries, and the perpetrators and beneficiaries of the fraud by subsequent and affirmative acts of fraud conceal the original fraud from the knowledge of the Government until after six years have elapsed from the date of the issuance of the patents, will a court of equity permit the wrongdoers to enjoy the fruits of their fraud, by pleading the statute of limitations as a defense when the delay in the institution of suit was deliberately induced by fraud practiced upon the Government for the express purpose of gaining the benefits of the statute?"

It was ruled that such a case was within the doctrine of *Bailey vs. Glover, supra.*

The findings of fact and the opinion of the district court upon the trial of said case are reported in 225 Federal, 854. Therein may be found, among other, the following findings of fact:

> "As soon as the final proofs were made and the money paid by the agent of the Exploration Company to the respective officers of the land offices within whose jurisdiction the lands were situated, the entry-

men and women executed deeds of conveyance for their respective tracts of land and delivered them to Henry Burrell. These deeds Henry Burrell caused to be made to Alexander Burrell, his brother. Some time later Alexander Burrell conveyed these lands to one Albert L. Smith, a banker in Helena, Mont., without any consideration except the promise of Smith to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. Charles A. Molson, the agent, having died, the Exploration Company appointed the defendant, Philip L. Foster, as its general agent in the United States, with a power of attorney to act generally in its behalf. Thereupon Albert L. Smith, at the request of the defendant's agents, conveyed these lands to Mr. Foster without any other consideration. *The legal title has ever since been in Mr. Foster, who holds it in secret trust for the Exploration Company.*"

The court also found "that the defendants did not actively conceal the facts which constitute the frauds in this case, *by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the Government*, but were only guilty of a passive concealment." But the court did not find "that the complaint charged in specific terms that the ignorance of the fraud had been caused by affirmative acts of concealment of the guilty parties, while at the hearing the evidence shows, and the court so finds, that the parties were not guilty of any active or affirmative concealment of their acts which are alleged to constitute the fraud for which the patent should be set aside, but were only guilty of passive concealment," this language having been used by the court not as a finding of fact, but as a statement of the contention insisted upon by the defendant. Perhaps the language contained in the finding next above quoted, "but were only guilty of a passive concealment," was intended to relate only to the conduct of the defendant in reference to the particular matters in said finding mentioned,

namely, "by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the Government;" or it may be that said language was intended by the court to characterize the conduct of the defendant as set out in the findings first recited, as being only "passive concealment."

We do not pause to determine which construction should be placed upon the language. It is wholly immaterial. The court's characterization of the conduct of the defendant as "passive concealment" does not make it so. The facts found by the court speak for themselves. They were doubtless affirmative fraudulent acts, perpetrated for the purpose of concealing the cause of action, then existing, from the plaintiff. But whether they be characterized as affirmative or negative acts, it is clear that they were acts performed by the defendant for the purpose of concealing the cause of action subsequent to the date of the accrual of the same, and that they were pregnant with the quality of *legal fraud which is an essential element of every act of concealment before it is sufficient* to toll the running of the statute. That the conduct of the defendant, subsequent to the consummation of the initial fraud, must be such as is deemed fraudulent in law before the same is efficient to toll the running of the statute is clearly recognized by this court in the very learned and able opinion when the case was pending before it upon demurrer, 203 *Federal*, 389, when, in overruling the defendant's contention, the court, among other things, said:

> "We should hesitate to impute to the lawmaking power such an intention for many reasons: * * * Fifth, it would render it possible for one who had defrauded the United States of land to prevent an inquiry in regard to the same by the commission of additional fraud; sixth, it would permit one to set off one fraud against another; seventh, it would allow

> one to take advantage of one's own wrong, which is not to be thought of in a court of equity."
>
> *See also Avery vs. Cleary*, 132 U. S., 609.

On appeal to the Supreme Court of the United States, the learned attorney general did not acquiesce in the view that the lower court in its findings had characterized the conduct of the defendant, tending towards concealment, as being only passive in its character, or in this view of the facts established upon the trial of the case, but, on the contrary, insisted that the case fell within the rule of *Wood vs. Carpenter*, 101 U. S., *supra*, wherein it is declared that "concealment by mere silence is not enough—there must be some trick or contrivance intended to exclude suspicion and prevent inquiry," and among other things the learned attorney general said:

> "In this case such trick or contrivance is flagrant."

And also again said:

> "The recording of deeds such as these were of themselves affirmative acts of concealment of the fraud after the patents. (See brief of the United States, pages 44-46.)

The lower court very properly ruled that the case fell within the principles of *Bailey vs. Glover* and like cases, and that *Wood vs. Carpenter, supra, Felix vs. Patrick, supra*, and like cases were in harmony with *Bailey vs. Glover*, which ruling was affirmed in 235 Fed., 110, without any modification whatever of the findings of fact made by the lower court. True, this court said:

> "In deciding the questions raised by the demurrer, we of course referred to the language of the complaint; but the reason for our ruling, and the authorities cited in support thereof, applied to cases of concealed fraud, whether active or passive."

As every decision of a court must be read and interpreted, in view of the facts of the case presented, doubtless the court's reference to "passive concealment" was to a concealment passive in the sense that the facts found in the case showed the concealment of the defendant to be, and doubtless also the court had in mind the rule which it had so clearly enunciated in the former opinion in the cause, "that the conduct of the defendant tending towards concealment must be *conduct which is fraudulent in law*, and did not include within this general language a mere failure of the wrongdoer to seek out the party defrauded and confess the wrong to him, without inquiry or occasion therefor," which is excluded from conduct deemed fraudulent in law and sufficient to toll the running of the statute.

But the last word upon this subject is the decision of the Supreme Court of the United States in that case, *U. S. vs. Exploration Company*, 247 U. S., 435. It resulted in the affirmance of the judgment below on the authority of *Bailey vs. Glover*, *Sherwood vs. Sutton*, 5 Mason, 143, like cases in the Supreme Court of the United States, and *Linn and Lane Timber Co. vs. United States*, *supra*. The decision clearly and distinctly reaffirms the correctness of *Bailey vs. Glover*, in so far as the facts of that case are concerned, and just as clearly and distinctly points out under what circumstances the doctrine of *Bailey vs. Glover* is applicable in the concluding portion of the opinion, wherein the court says:

> "It is not our belief that Congress intended that the Government should be deprived of title to public lands by those who *add to the fraud by which they were obtained artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years.*"

Thus, to the "fraud by which they were obtained" something must be "*added*," and that something is "*artifices which enabled the wrongdoer to conceal the fraudulent manner in*

which lands were secured until the action was supposed to be barred by the lapse of six years."

The usual meaning of the word "artifice," as given by Webster's New International Dictionary, is "crafty device; an artful, ingenious or elaborate trick."

The word is defined in Corpus Juris (5 C. J., 594) as "the art of making an ingenious contrivance or device of some kind; subtle or deceptive art in contriving; trickery, cunning, strategy, finesse, a trick or fraud," and it is in the latter sense, that is, as a "trick or fraud," that the word is used when importing evil conduct.

In *Lake vs. Gilchrist*, 7 Ala., 955, the Supreme Court of that State defined the words "artful concealment" as follows:

> "We are not prepared to say, that the mere silence of the defendants at the time of the transfer, of the insolvency of Campbell, if known by them, would be a fraud. By the term 'artful concealment' we understand that some unfair practice was resorted to, by which the plaintiff was intentionally deceived. So considering it, we think the count good, and the court therefore erred in sustaining the demurrers to these counts."

In *United States vs. Dexter*, 154 Fed., 896, it is said:

> "An 'artifice' may be said to be an ingenious contrivance or device of some kind, and when used in a bad sense the word corresponds with 'trick' or 'fraud.' Hence a 'scheme or artifice' to defraud, within the meaning of this statute, would be to form some plan or devise some trick to perpetrate a fraud upon another."

In *State vs. Hamm*, 48 N. W., 971, the Supreme Court of Iowa, on page 974, said:

> "Webster defines 'artifice' in its bad sense as 'trick or fraud.'"

See also *State vs. Hamann*, 80 N. W., 1065.

The result of the foregoing study of the allegations of plaintiff's complaint, and the cases of *Bailey vs. Glover*, *Carpenter vs. Wood*, *Feliz vs. Patrick*, *United States vs. Exploration Company*, and the other decisions hereinbefore referred to, may be summarized as follows:

The allegations of concealment state no facts, and are mere conclusions of law. Construed in the most favorable light of the plaintiff which can possibly be contended for, they only leave us to infer that the defendant, after the issuance of the patents, failed to seek out the plaintiff, and without inquiry or solicitation, confess to it the original and initial fraud; or in other words, remained silent and failed to make a voluntary disclosure.

That by reason of the broad statement of general principles, the universality of the language, and the generic character of the classification embodied in the language of *Bailey vs. Glover*, its applicability to specific cases and state of facts remain questions of judicial determination as such specific cases arise; and that likewise the language of *Bailey vs. Glover* was intended to be, and has been, construed in the light of universal and acknowledged principles of law then existing, and which were not stated, and which it was not necessary to state, in the decision of that case. That one of these principles of law, necessary to be remembered in connection with that decision, is that after the consummation of a fraud, and the accrual of the cause of action resulting therefrom, the mere failure of the wrongdoer to seek out the injured party and confess the wrong is not in law deemed a *fraudulent concealment* of the cause of action, and therefore does not toll the statute of limitations.

That this principle has been forcibly and clearly expressed in *Carpenter vs. Wood*, *supra*; *Feliz vs. Patrick*, *supra*, and almost as forcibly and clearly expressed in the case of *United States vs. Exploration Company*, *supra*, by the Supreme Court of the United States, and maintained by direct implication of equal force, with positive declaration, in all the cases hereinbefore cited.

That these decisions are not in conflict with and neither overrule nor modify *Bailey vs. Glover,* but only *interpret* by *specific* application the doctrine of that decision.

That there is no conflict in these decisions has been declared by the court which rendered them, and that full effect is given to all of them by the conclusion here reached is clearly apparent. At the time of the rendition of the decision in *Exploration Company vs. United States,* the court was, as a court always is, conclusively presumed to know and have in mind the state of the law, as the same had been theretofore declared by it. In addition to this presumption, an examination of the briefs on file in that case show that the decisions hereinbefore cited were pressed upon the attention of the court. The court makes no mention of these decisions in its opinion. There was no occasion for it to do so. The facts of the Exploration Company case did not bring it within the principles therein announced, but the court says:

> "*Bailey vs. Glover* has never been overruled nor modified in this court and has been approved and followed."

That the court had in mind, and intended to reaffirm the subsequent decisions, and deemed the principles therein announced in perfect accord with *Bailey vs. Glover,* appears unquestionably from its declaration that "It is not our belief that Congress intended that the Government should be deprived of title to public lands by those who *add* to the *fraud* by which they were obtained *artifices* which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years."

In *Keithley vs. Mutual Life Insurance Co., supra,* 111 N. E., 503, the Supreme Court of Illinois had under consideration the question whether mere failure to disclose, or, in other words, mere silence, was such fraud in law as to toll the running of the statute of limitations. Therein we find a very full and elaborate review of the decisions of the Su-

preme Court of the United States, from *Bailey vs. Glover* to *Felix vs. Patrick*, as well as a review of the decisions of many of the State courts.

The Illinois court failed to find any conflict in the decisions of the Supreme Court of the United States, and held (page 507) "that the fraudulent concealment of a cause of action which will prevent the running of the statute of limitations must be some affirmative act or representation intended to prevent the discovery of the cause of action, which does actually prevent such discovery."

In the case of *Jackson vs. Jackson*, 47 N. E., 964, the Supreme Court of Indiana said:

> "The statute of limitation is recognized as one of repose, and it has been frequently held by this court, in placing an interpretation upon the above section, that, in order to bring a case within the concealment intended by its provisions, there must be something more alleged and proven than the mere silence or general declarations upon the part of the person said to have concealed the cause of action. There must have been some trick or artifice to prevent a discovery, or some material fact misstated to or concealed from the party by the means of some positive or affirmative act or declaration when inquiry was being made or information sought, and under such facts the operation of the statutes is suspended, and does not begin to run until after the discovery of the cause of action, or, as the authorities assert, from the time the discovery by the exercise of ordinary diligence might have been made. A failure to discover the cause of action does not, like its concealment, suspend the running of the statute. The concealment within the meaning of the statute cited arises out of fraud, and there can be no concealment without fraud; and, while the fraud in a particular case may be sufficient to give to the complaining party a right of action, still it may not, in the same case, be also sufficient to serve to conceal the cause of action within the contemplation of the law."

And again:

> "The pleading leaves us to indulge, in part, in speculation or inference, and in this respect violates the rule which requires that a party relying upon fraud must plead all the facts constituting the same, for, as presumptions are in favor of fair dealing, nothing is to be taken by intendment or inference."

And also:

> "The failure to answer the letters upon Appellee's part, or to give the information requested, were but acts of silence, and are not available to constitute a concealment of the action; and the allegation that these acts resulted in such concealment is but a bald assertion or a mere conclusion."

Neither does the allegation that "it was a part of said conspiracy and understood and agreed among said conspirators, said defendant and said entrymen, that said frauds and said conspiracy and the true facts surrounding said entries and purchases should at all times be concealed from the plaintiff, etc.," aid the plaintiff in the least. It is distinctly alleged that this agreement was a part of the original conspiracy charged and set out in the bill of complaint. It was therefore a part of the initial fraud and merged in the cause of action which accrued upon the issuance of United States patents to the several entrymen. See *United States vs. Puget Sound Traction, Light & Power Co., supra*, page 440, where it is said:

> "Representations made by defendant Cornwall, it might be inferred, would be prior to patent, since he held the land during that period. Such representations would be merged in the fraud which culminated in the issuance of the patent, and upon which the Government's right to annul the patent would rest. Subsequent representations might amount to active concealment of this cause of action. It therefore becomes important to inquire just what representations

were made prior and which were made subsequent to the issuance of the patent. The allegation contains no answer to this inquiry."

Moreover in perfect analogy with the allegations touching the concealment of the cause of action by the defendant, it is apparent that the utmost effect that can be given to this agreement for concealment is that at the time the conspiracy was entered into the conspirators agreed, each with the other, that they would not "seek out the Government and voluntarily confess the wrong perpetrated against it," or, in other words, that they would remain silent.

Since it has appeared the silence of the defendant, after the accrual of the cause of action and the full completion and accomplishment of the wrong, does not amount to fraud in law, and does not toll the running of the statute, it follows that the agreement alleged does not add to such silence any evil quality. In other words, it is clear that an agreement to do an act which is entirely innocent adds no evil quality to the act itself, and does not convert that which is rightful into that which is wrongful. The mere silence of the defendant is equally innocent, whether accompanied by an agreement to remain silent or whether arising from an undisclosed self-determination to do so.

II.

The bill of complaint fails to state any facts from which it can be determined the time when the fraud charged in the bill of complaint, or the concealment thereof, was discovered by the plaintiff, or what the discovery was; and it is not therein alleged when said discovery was made, or what it was, or how it was made, or why it was not made sooner, and the court is unable to say whether, by ordinary diligence, the discovery might not have been made within a reasonable time after the perpetration of the frauds complained of.

Altogether apart from the question whether or not the bill of complaint charges facts showing a fraudulent concealment

of the cause of action, or that the frauds committed were of a self-concealing nature, when the bill shows, as in this instance, that the action was not brought within the time limited by the statute, the duty devolved upon the plaintiff to show by the allegations of his complaint that he has not been wanting in diligence; and in order to do this, it is necessary for the plaintiff to allege the *time when the fraud charged was discovered, and what the discovery was, how it was made, and why it was not made sooner*, in order that the court may be able to say whether, by ordinary diligence, the discovery might not have been made within the period of the statute of limitations. And such was the ruling of the court of appeals in this case. On page 29 of the transcript of record, the court said:

> "Hence, the first question in this case is, has the plaintiff averred in its bill of complaint, facts which show that it exercised reasonable care and diligence to discover the fraud, that it had no means of knowledge thereof, no notice sufficient to put it on its guard and call for inquiry, and has it alleged the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence? For the rule is firmly established by repeated decisions of the Federal courts that all these allegations and more are indispensable to the statement of a cause of action in equity for relief from a statute of limitations on the ground of ignorance of the fraud. (Citing cases.) The only facts averred in the bill of complaint pertinent to the question whether or not the plaintiff exercised reasonable diligence to discover the fraud between 1903 when its perpetration was complete and the commencement of this suit on October 11, 1917, were these: The coal company and the entrymen conspired to commit the fraud before they perpetrated it, and, as a part of that conspiracy, they then had an understanding and agreement that they should be

silent concerning it and should conceal it. They have done so. 'Neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, excepting that on or about the month of November, 1916, there was filed in the General Land Office of the United States, at Washington, D. C., a report upon said entries by one John A. Smith, special agent of the Department of the Interior.' Ever since that day the Interior Department and the Department of Justice have been diligently investigating the fraud and preparing and instituting judicial proceedings to avoid its effect. At the time the lands were entered and at the time the conspiracy to enter them was formed the coal company was in possession of the land and it has been in possession thereof ever since, and for many years it has been mining these lands and extracting coal therefrom. Each of the entrymen conveyed the portion of these lands that he entered to the coal company immediately after the final entry thereof. The complaint contains no allegations of any other facts tending to show diligence to discover the fraud."

Continuing, the court said:

"Again the burden was upon the complainant to allege facts disclosing persuasive equitable grounds for excusing its failure to discover and avoid the fraud. The Supreme Court has repeatedly pointed out the averments necessary to be made in a pleading to enable the plaintiff to bear this burden. In *Wood vs. Carpenter*, 101 U. S., 140, 143, it declared that a general allegation of ignorance at one time and knowledge at another, was of no effect, that there must be distinct averments as to the time when the fraud was discovered, what the discovery was, how it was made, why it was not made sooner, that the circumstances of the discovery must be fully stated, and that the delay must be shown to have been consistent with requisite diligence. Over and over again has the

Supreme Court approved this statement from *Badger vs. Badger*, 69 U. S., 95, 'The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.'

"The bill of complaint fails to contain the allegations thus specified and adjudged indispensable to the complainant's alleged cause of action. It contains no averments of any impediments to an earlier prosecution of the plaintiff's claim other than the immaterial fact that it was ignorant of its claim in 1903 and aware of it in 1916. The agreement and understanding of the coal company and the entrymen, to keep silent about and conceal the fraud, is alleged to have been made before it was committed and is therefore merged therein. *United States vs. Puget Sound Traction, etc., Co.*, 215 Fed., 436, 440. The complaint contains no allegation of any means used by the coal company after the completion of the fraud in 1903 to keep the plaintiff in ignorance of it. There is nothing in the complaint to show why the fraud could not have been discovered and the suit brought as well at any time after 1903 and prior to 1915 as after the latter date. There is no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a report on the entries on which complaint is made. But the bill contains no statement of the facts this report revealed, of who discovered them, when they

were discovered or how or why the special agent made the report, or of any other material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916."

In *United States vs. Puget Sound, etc., supra*, page 441, the court said:

"Counsel for the Government cite many authorities to the effect that where the fraud is of a self-concealing nature, and the injured party remains in ignorance without any fault or want of diligence on his part, the statute does not begin to run until discovery, though there may be no special efforts on the part of the other party to conceal it. This is the rule as quoted from *Bailey vs. Glover, supra*. The very statement of that rule compels the conclusion that, if an injured party is wanting in diligence, the statute begins to run against him from the commission of the fraud, and not from the date of discovery, even though the fraud may be of a self-concealing nature."

And again, page 443:

"I am therefore of the opinion that, when the Government is seeking to avoid the bar of a self-imposed statute of limitations, it must allege facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party, or that the fraud is of a self-concealing nature, *and* the failure to discover it was not due to negligence or want of diligence on the part of the Government."

The rule is clearly stated in *Wood vs. Carpenter, supra*, page 140, as follows:

"In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence,

the discovery might not have been before made. *Stearns vs. Page*, 7 How., 819. This is necessary to enable the defendant to meet the fraud and the time of its discovery. *Moore vs. Greene*, 19 How., 69.

"A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr vs. Hilton*, 1 Curt. C. C., 220."

In *Badger vs. Badger*, 2 Wal., 94, in speaking of the excuses for laches, it was said:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In Stearns *vs.* Page, 7 How., page 826, it was sought to open an account settled nearly thirty years before, on the grounds of fraud and concealment. The cause was governed by a statute of limitations of six years. Among other things the court said:

"But as lapse of time necessarily obscures the truth and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. * * * A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation or concealment—must specify how, when,

> and in what manner, it was perpetrated. * * * And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

And as a petinent inquiry to the sufficiency of the bill, the court, speaking of the plaintiff, inquired:

> "Has he discovered anything which was not as open to discovery by himself or his predecessor in the administration, more than twenty years before?"

The only allegation, touching any of these points, contained in the complaint, is as follows:

> "That neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff as aforesaid, except that on or about the month of November, 1916, there was filed in the General Land Office of the United States at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior. That immediately thereupon, and at all times thereafter, the Department of the Interior of the United States and the Department of Justice of the United States have been engaged in the continuous and diligent prosecution of the work of investigating and ascertaining the true facts in the premises and in preparing and instituting appropriate judicial proceedings to enforce the rights and remedies of the plaintiff in the premises."

But plaintiff says it is excused from showing diligence and for its inaction covering a period of twenty years, because the defendant failed to disclose the frauds to it. The proposition denies the rule of diligence. Without concealment the statute would run from the date of the issuance of the

patents. With concealment, using that term in its legal sense, the statute also runs, unless the plaintiff discloses in its complaint the exercise of due diligence in the premises, and in order to affirm the same it is necessary for plaintiff to allege when the fraud was discovered, what the discovery was, how it was made and why it was not made sooner. Upon these allegations it is for the court to determine whether the plaintiff has been reasonably diligent in its effort to discover the fraud. An allegation equivalent only to the statement that the defendant failed to disclose to the plaintiff the frauds perpetrated by it does not, of course, excuse a lack of compliance with these rules. Were this true, the rule would be abrogated. Affirmative action on the part of the plaintiff would be excused by lack of affirmative action in the nature of a disclosure upon the part of the defendant.

We search the bill of complaint in vain for any allegation as to when the United States first discovered the alleged frauds. The only thing that is made clearly apparent is that this discovery was made some time before November, 1916, for it is clear that during that month one John A. Smith, a special agent of the Department of the Interior, made a report in the *line* of his *duties* to the Secretary of the Interior, disclosing the fraudulent conduct of the defendant, but when the facts reported by him were discovered neither implication nor direct averment furnish any information, and it can hardly be open to controversy that information acquired by the said Smith, in the line of his duties, as an agent of the Government, or of the Secretary of the Interior, and therefore of the Government, is chargeable to the plaintiff and to the Secretary, in his official capacity, as well.

It is true that direct authority of the Secretary of the Interior to appoint special agents to investigate the fraudulent acquisition of public lands, so far as the statutes of the United States are concerned, is found only in the appropriation laws, but those laws clearly vest the Secretary of the Interior with

this authority, and likewise clearly charge such agents with the discharge of the duties in which the special agent Smith was engaged. The law of 1897 is typical of all the other laws upon this subject. It provides as follows:

> "To meet the expenses of protecting timber on the public lands and for the more efficient execution of the law and rules relating to the cutting thereof; of protecting public lands from *illegal and fraudulent entry or appropriation*, and of adjusting claims for swamp lands * * * ninety thousand dollars; provided, that agents and others employed under this appropriation shall be allowed per diem * * *."
>
> U. S. Statutes at Large, vol. 30, page 32.

Aside from this statute, the multiplicity of duties devolving upon the Secretary of the Interior, the magnitude of his task, and of the Government's interests involved, necessarily imply authority upon the part of such Secretary to appoint agents whose special duty it is to protect the rights of the Government in the public lands.

In *United States vs. Schlierholz*, 133 Fed., 333, the court said:

> "The duty imposed by law upon the Secretary of the Interior to have supervision over public lands, and the duty imposed by law upon the Commissioner of the General Land Office to perform all the duties appertaining, or in anywise respecting such public lands, under the general supervision of the Secretary of the Interior necessarily requires these officers to act by and through the agency of others. Many of their duties necessarily delegated, may well be performed by minor agents, special employees, or servants. The right to employ these agents is incidental to the obligation to enforce the law."

By the rules and regulations of the Department of the Interior, which rules and regulations it is well understood have the force and effect of law, and of which judicial knowledge

will be taken by all the courts, these special agents are charged with the special duty of investigating and reporting upon all fraudulent land entries. These rules were adopted as early as 1885, and perhaps many years prior thereto. See Copp's Public Land Laws, 1890, vol. 1, page 56. By these rules they were directed "to carefully, accurately, and thoroughly investigate every case of alleged fraudulent or illegal entry or appropriation of public lands referred to them by the Interior Department, or in any manner brought to their attention, in the discharge of their official duties," and "report thereon to the Secretary of the Interior."

Smith's report, as the very language of the complaint indicates, was in the line of his duties, and being in the line of his duty, the investigation leading up to said report was likewise in the line of his duty to the Government, and being an agent of the Department of the Interior, that Department is charged with knowledge of all that came to him in the line of his duties, and the United States is bound thereby, for it is charged with notice of the knowledge of its agents, obtained in the line of their duties, just as certainly as any corporation or individual would be so charged, and this is consonant with the views expressed by the Attorney General of the United States in the Exploration Company case. In the brief of the Government, filed in that case in the Supreme Court, on page 44, the learned Attorney General says:

> "But counsel ask, 'Who is the United States when it comes to the question of acquiring knowledge of a fraud?' We answer the question with another—who is any corporation for the same purpose? Certain officers of the Government are charged with prescribed duties, just as are the officers of any large corporation, and equally in the one case as in the other knowledge or means of knowledge on the part of the *agent* in the line of his duty would be imputed to his principal."

When, then, did this agent obtain knowledge of these frauds? When did this agent begin his investigation, and when did the Secretary of the Interior direct the investigation to be made? Evidently the investigation was made pursuant to instructions, for it is alleged that the special agent "filed in the General Land Office of the United States at Washington, D. C., a *report*," which clearly implies prior instructions to investigate, and aside from this language it would not be considered probable that a special agent of the Secretary of the Interior would undertake an investigation of titles of over twenty years old without specific authority from his superior.

We find no answer to these questions in the bill of complaint. Therefore, the time of the discovery is not stated.

We also look in vain to the complaint for any allegation as to *how* this discovery was made. There are no circumstances stated surrounding the same, and the court is not advised of any particular fact in connection therewith. Likewise, nothing whatever is alleged in the complaint *why* the discovery was not made sooner. In other words, no excuse whatever is given for the lethargy of the plaintiff covering a period of almost twenty years, or any valid reason assigned why the same discovery might not have been made within the period of the statute of limitations.

It seems to be insisted that the mere legal conclusion of the pleader that the defendant concealed the cause of action, is sufficient for this purpose, but before the plaintiff can toll the statute, concealment upon the part of the defendant and diligence upon the part of the plaintiff must be shown. Both must concur without concealment the statute runs, and with concealment and without diligence the statute also runs. Moreover, the facts alleged in the complaint clearly destroy and negative the mere legal conclusion alleged therein that the defendant fraudulently concealed the cause of action. The possession of the property by the defendant at the

time of the entry of the same by the several entrymen, the allegations in relation to the execution and delivery of the several deeds mentioned therein, together with the failure to allege that the same were withheld from the records of the county in which the land is situated, with the legal inferences to be drawn therefrom, clearly negative the legal conclusion of concealment stated in the complaint. This we shall show in the next subdivision of this argument.

We look in vain for any valid reason why this discovery should not have been made within the period of the statute of limitations. From the date of the issuance of the patents until 1916 it is not alleged that anything came to the attention of the plaintiff arousing its suspicion and calling upon it to make an investigation, other than that which was known to it at the date of the issuance of the patents. Upon that date the defendant was in possession of the property to which the patents were issued, and likewise, at the respective dates of the issuance of the patents, or immediately thereafter, in such instance the defendant obtained conveyances from the several entrymen of the legal title, and in the absence of any allegation that such conveyances were withheld from record such cannot be presumed to be the case. The plaintiff, like an individual or a corporation, on account of the duty of diligence to discover the fraud which rested upon it, is presumed to have had knowledge of these facts, and there never was a time, from the time of the issuance of these patents, when these facts, together with the other facts alleged in the complaint, did not call as urgently upon the Government for action as they did in the year 1916; and if the duty of an investigation rested upon the Government in 1916, the same duty rested upon it to make this investigation within the period of the statute of limitations, for the reason that the evidence of misconduct upon the part of the defendant was as patent to the Government within the statute of limitations as it was at any time thereafter.

Whatever moved the Government to action in 1916 should therefore have moved it to action within the period of the statute of limitations, and no valid reason appears in the complaint, neither is any attempt made to state any valid reason, why the investigation and discovery was not made within such period of the statute of limitations instead of many years beyond the same, and the court cannot clearly or otherwise see whether, by ordinary diligence, the discovery might not have been made within six years from the respective dates of the issuance of the patents.

III.

The facts stated in the complaint clearly negative the legal conclusion of concealment therein alleged, and it appears affirmatively therefrom that the discovery of the alleged frauds ought, with reasonable diligence, to have been made within the period of the statute of limitations, and that the Government had sufficient notice to require action and investigation upon its part and, failing therein, to bar its cause of action.

It is clearly alleged therein that at the time of the respective entries of the lands in question, the defendant was in possession thereof, and also of the mines thereon (Tp., p. 7), and likewise clearly alleged that the defendant has since continued in the possession, and has been engaged for many years in mining and selling the coal contained therein (Tp., p. 11), and that other mines of the defendant lie in close proximity to the lands in controversy.

It also clearly appears that these eighteen entries were made in quick succession, one after the other, and that the several entrymen contemporaneously, or almost contemporaneously, with the respective dates of entry, duly executed deeds to these lands to the defendant. In the case of ten of these entries the deeds were executed upon the same day; in

four of these entries, less than thirty-six days thereafter, and in the other entries, either at the date of, or very shortly after, the issuance of the patents.

There is no allegation that the defendant did not promptly record these deeds, and as the failure to record a deed is a badge of fraud, and fraud cannot be presumed against the defendant without distinct allegations relating thereto in the bill of complaint, it follows that for the purpose of the question here under discussion the defendant must be deemed to have duly recorded said deeds at the time of the receipt of the same.

From this it not only appears that there was no concealment, but it also appears, when the legal presumption of notice of these facts is indulged in, as it must be, that the United States had sufficient notice from the date of the issuance of these patents to call for action upon its part by way of investigation, if it desired to preserve its rights to bring a suit, after the expiration of the period limited in the statute of limitations, to recover these lands on the ground of either fraud or mistake.

United States vs. Norris, 222 Fed., 16.
Felix vs. Patrick, 145 U. S., 329.
Niles vs. Cooper, 98 Minn., 39.
Kirby vs. Tallmadge, 160 U. S., 379.
Hughes vs. United States, 71 U. S., 235.
White vs. White, 89 Ill., 461.
Dennis vs. Nor. Pac. Ry., 55 Pac., 213.
McDonald vs. Bayard Sav. Bank, 98 N. W., 1025.
Van Gunden vs. Virginia Coal & Iron Co., 52 Fed., 838.
Piekenbrock & Sons vs. Knoer, 114 N. W., 200.
Nash vs. Stevens et ux., 65 N. W., 825.
Simmons vs. Baynard, 30 Fed., 537.
Clark vs. Van Loon, 108 Iowa, 250.
Teal vs. Slaven, 40 Fed., 774.
Burley vs. Newland, 39 Pac., 49.
Schruggs vs. Decatur Min. Co., 5 So. 440.

In the opinion of the court of appeals we find that upon this point the court said:

> "The Supreme Court, quoting from Angell on Limitations, section 187, and note, said in 101 U. S., 141, 'The presumption is that if the party affected by any fraudulent transaction or management, might with ordinary care and attention, have seasonably detected it, he seasonably had an actual knowledge of it.' The transaction here was in reality a sale of the lands by the United States for cash through its local land officers. The fraud alleged was that the United States was induced by the false representations of the coal company and its agents, the entrymen, to sell the lands to the coal company in the belief that it was selling them to the entrymen. But the coal company was in possession of the lands at the time the sale was made and has been in possession of them and operated them ever since. Possession of real estate is notice to the world of the possessor's title. The entrymen conveyed all these lands to the coal company prior to the year 1904. There is no averment in the bill of complaint that these conveyances were not seasonably recorded. In reality this is a suit to rescind a sale for cash of speculative mining property, a proceeding which demands extraordinary promptness and diligence on the part of him who would rescind, on account of the changing values of the property. It is incredible that, under this state of facts, a vendor to whom the open, continuous, operative possession of the fraudulent vendee gave constant notice of its claim of title ever after 1903, could not or would not, if it exercised ordinary diligence, have discovered to whom it had sold its property long before the six years allotted by the statute expired."

And in concluding the opinion (Tp., p. 31) the court said:

> "And the conclusion of the whole matter is that the complaint states a case in which, in view of the constant operative possession of the coal company of all the lands in controversy, from prior to 1903 to the present time, and of the conveyance of them to it by

> the entrymen prior to 1904, the exercise of ordinary care and diligence could and would have discovered the patents, and it fails to contain allegations indispensable to constitute a cause of action in equity to relieve the plaintiff from the bar of the act of Congress of March 3, 1891. The decree below must therefore be affirmed, and it is so ordered."

The case of *United States vs. Norris, supra*, decided by the Court of Appeals of the Eighth Circuit, is directly in point. That was a suit to vacate a patent on the ground of fraud in procuring the same, and was brought against the original patentee, and by amended bill also proceeded against Rounds, his grantee. It was alleged "that on June 14, 1909, Norris made a pretended conveyance of the land to the defendant Rounds for a pretended consideration of $3,000, for the purpose of preventing the complainant from recovering such land from him, and that defendant Rounds knew of the fraud perpetrated by Norris in obtaining the patent for and title to the land." The suit was continued against Rounds more than six years after the issuance of the patent. The question arose as to whether or not, as to him, the same was barred. On page 19 the court said:

> "There is neither allegation nor proof of any concealment on the part of Rounds of his purchase of the property, nor of any other fraud on his part to delay the commencement of the suit against him until the statute of limitations had run. The bill avers that his purchase of the land from Norris was on June 14, 1909, and that the deed to him was filed for record in the office of the register of deeds for Woodward County, in which the land is situated; and it was so filed June 16, 1909. *This was within six years from the date of the patent.* * * * Nor is it involved in the case before us, for, as before stated, there is neither allegation nor proof of any concealment on the part of Rounds *of his purchase of the land. In fact, he placed the evidence of his purchase upon the public record of land titles in the county where the*

land is situated before the suit was brought against Norris."

And thereupon the court quotes with approval from *Woods vs. Carpenter, supra*, the following:

> "'Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together. * * * In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'"

In *Felix vs. Patrick, supra*, page 331, the court said:

> "But no acts of his in this connection are averred in the bill, and we are left to infer that his concealment was that of mere silence, which is not enough * * * *Indeed his concealment is to a certain extent negatived by the fact that he put the power of attorney and deed upon record, in the proper county, shortly after their execution.*"

The allegations of the bill, touching the possession of the defendant, extending from the dates of the respective entries, and down to the date of the commencement of this suit, and the acts of ownership alleged therein, carried out by the defendant, constitute constructive notice to the Government that at the very time the entries were made, and at

all times thereafter, the defendant had an interest in said property, and it thereupon became the duty of the Government to make suitable inquiries to determine the nature of such interest, and the recorded deeds, of which the Government likewise was bound to take notice, taken in connection with this open and notorious possession and these acts of ownership, certainly called upon the Government to act if it ever intended to question the title of the defendant, evidenced by its possession and by the deeds of grant under which it held.

In *Niles vs. Cooper, supra*, the Supreme Court of Minnesota said:

> "The authorities are uniform that actual possession of real property is notice to all the world of the title and rights of the person so in possession, and also of all facts connected therewith which reasonable inquiry would have developed. The rule in this respect differs from the rule of constructive notice, arising from the record of instruments affecting the title to land; for there the record is notice only of what appears upon its face, and such additional facts as its language directs attention to."

The case of *Hughes vs. United States, supra*, was a case to vacate a patent to certain lands purchased by Hughes, at private sale, from the Government, which said lands were at such time in the possession of another, who, by such possession, had acquired the right to pre-empt the same. On page 236 the court said:

> "The patentee cannot complain of the proceeding, for the open notorious and exclusive possession of the premises, by the parties claiming under Goodbee, when the patentee made his entry and received the patent, was sufficient to put him upon inquiry as to the interests, legal or equitable, held by them; and if he neglected to make the inquiry, he is not entitled to any greater consideration than if he had made it and ascertained the actual facts of the case."

In *McDonald vs. Bayard Sav. Bank, supra*, the Supreme Court of Iowa said:

> "The conclusion which we reach disposes of all questions in the case, except the contention that the deed was procured by fraud or executed by mistake. The evidence does not show either fraud or mistake, but, were one or both shown, this suit, so far as it is based thereon, was fully barred by the statute of limitations. As we have before said, the quitclaim deed was recorded on the 21st day of March, 1895, and knowledge of the fraud, if any there was, must be imputed to the plaintiffs as of that date. The statute begins to run, not from the time when the fraud is actually discovered, but from the time when it might, by the exercise of diligence, have been discovered. * * * And the recording of the deed was sufficient notice thereof to set the statute in motion."

In *Van Gunden vs. Virginia Coal & Iron Co., supra*, page 849, the Court of Appeals said:

> "If at the date of the deed, purporting to convey the interest of the heirs of Nathan Fields in the land in controversy to the plaintiffs, April 30, 1888, other persons than those who conveyed to the plaintiffs were in the open and notorious possession of the land, that of itself was sufficient to put the plaintiffs upon inquiry, and it was their duty to ascertain the character of the title of those who so held the possession. The plaintiffs will be considered as fully informed of those matters which they could have discovered had they discharged that duty."

In *Pickenbrock & Sons vs. Knoer, supra*, the plaintiff had obtained a judgment against one J. J. Knoer, which remained unpaid. It was alleged that after the rendition of such judgment, and on or about February 1, 1897, the said Knoer purchased 120 acres of land in Palo Alto County, and, for the purpose of defrauding his creditors, caused the title to be conveyed to his wife, Mary A. Knoer, who took and

held the same in secret trust for his use and benefit. The deed was duly recorded in the office of the recorder of Palo Alto County on February 8, 1897. It was alleged that the plaintiffs lived in Dubuque, Iowa, and that their attorneys who procured the judgment resided in Algona, in Kossuth County, and that the defendant, J. J. Knoer, concealed from them his ownership of said property, and that knowledge thereof did not come to said plaintiffs or their attorneys until about October 1, 1902, and that upon such discovery this action was promptly instituted. The defendant filed a demurrer to the petition because it appeared upon the face thereof that the alleged cause of action was barred by the statute of limitations. The court said:

> "Plaintiffs concede that, where a husband conveys land to his wife, an action to subject such land to the payment of debts, incurred by the husband prior to such conveyance, is barred after the expiration of five years from the record of the deed. * * * It is insisted, however, that, as the legal title in the present case was never in the judgment defendant, the rule does not apply, and that the statute of limitations did not begin to run until the actual discovery by plaintiffs of the alleged fraud. Our statute (Code, Section 3448) provides that actions for relief on account of fraud are barred within five years, but that in actions heretofore solely cognizable in courts of equity the cause of action shall not be held to have accrued until the alleged fraud has been discovered. The above cited cases constitute no exception to this rule of the statute, but are made to turn upon the proposition that the fraud must be held to have been discovered when the deed, the validity of which is attacked, was placed on record, giving notice of the transaction to the world. 'Knowledge of fraud,' as we have construed that expression in this connection, does not contemplate actual knowledge thereof before the statute begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud. The

record of a deed imparts constructive notice of its contents, and if the facts which the record shows, with other facts known to the creditor, are of a character to suggest fraud, he is charged with the knowledge which inquiry made with reasonable diligence would disclose. *This rule has its application not only as against creditors seeking relief, but as to other persons interested in or making claims to property which has been fraudulently conveyed by the recorded deed* * * * In the case of *Mickel vs. Walraven, supra*, we had occasion to say: 'It has frequently been held by this court that the record of a deed is notice to the world of its contents, and that, where a deed which is fraudulent as against creditors is spread upon the public records, notice to the world is given its character.' This language was used as applicable to an equitable action to subject land, which had been conveyed to the wife by a third party, to the payment of a judgment against her husband. We further said, in the same case, that the plaintiff must be held to have discovered the fraud in the conveyances at the time they were recorded. The allegations in the petition in the present case do not present any peculiar features or circumstances calling for the application of any different rule. The land which is alleged to have been purchased by the judgment debtor and conveyed by the seller to the debtor's wife lies within a half dozen miles of the place where the debtor resided at the time the debt was contracted and the judgment entered against him. The attorneys who procured the judgment reside in the immediate vicinity. The plaintiffs themselves reside within the State. If, as is now alleged, Mary A. Knoer had no property in her own right and no means with which to make the purchase of such land, that is a fact which must have been of some notoriety in the neighborhood, or, if not so, was a matter the truth of which could doubtless have been readily developed upon reasonable inquiry. *The fact that the wife of the judgment debtor took title to valuable land within a short period after the rendition of the judgment against her husband, and that thereupon both hus-*

band and wife went into possession of the property, and continued therein for five years or more, is in itself such a combination of circumstances as would excite inquiry, if not the suspicion of a reasonably prudent creditor; and when we add to this situation the further fact that during all of this time the deed purporting to convey title to the wife was a matter of public record, thereby putting creditors upon inquiry concerning its character, the reasons for holding that the statute of limitations begins to run with the recording of the deed are no less apparent or persuasive than they would be if the deed had been made directly from the husband to the wife."

The case of *Nash vs. Stevens, supra*, is a similar case to the one last above quoted from. The defendant pleaded the statute of limitations. The court said:

> "Actions in equity for relief on the ground of fraud are barred in five years after the fraud is discovered * * * The law does not contemplate actual knowledge of the fraud before the statute shall begin to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud * * * The recording of the deed imparts constructive notice of its contents. If the facts thus shown, taken with other facts known to the creditors, are of a character to suggest fraud as to them, they must be charged with the knowledge which inquiry made with reasonable diligence would disclose * * * In this case the Tama County land was situated in the county in which the action against the husband was pending, and was conveyed to the wife three days after the action was commenced, and within three months of its purchase by the husband. They had but little property, the wife having not more than $300. They continued to reside on the farm, and there was no apparent reason for the change in the title thereto, unless to protect it from the plaintiff. It is not shown that he was in any manner deceived in regard to the property of the wife. *Certainly the facts recited were sufficient to cause a*

man of ordinary prudence, situated as the plaintiff was, to make inquiries which would have shown the fraud, if any, in the conveyance. And this is true with respect to the subsequent acquiring of title to the Sac County land. Both these transactions occurred more than five years before the commencement of this action * * * The plaintiff has failed to use the diligence in prosecuting his claim which the law requires, and it is now barred by the lapse of time."

In *Clark vs. Van Loon*, 108 Iowa, 250, the plaintiff had caused certain land to be conveyed to the defendant, to be held by her as security for the payment of money owing by the plaintiff to the defendant, with an agreement that the defendant should convey the land to the plaintiff whenever he should desire to sell it, upon payment by him of the amount for which it should be held as security, and that she would not convey it to anyone else. It was further alleged that on the 30th day of June, 1887, with intent to defraud and cheat the plaintiff, she conveyed the land for the consideration of $1,000 to one A. W. Van Loon, and fraudulently concealed from the plaintiff her conduct and actions in the matter. That afterward, and before the 31st day of March, 1892, her grantee conveyed the land to other parties; that on the date last specified the plaintiff notified the defendant that he desired to sell the land, and requested her to send him a deed therefor, with a statement of the amount due her on account of notes and taxes; that she thereupon executed a quitclaim deed for the land to the plaintiff, and forwarded it, with the notes and tax receipts, to a bank in Austin, Minnesota, for the delivery of the deed on the payment of the amount due on the notes and for taxes paid; that at the time the plaintiff first ascertained that the taxes for the years 1888 to 1891, inclusive, had not been paid, and upon investigation learned that the land had been conveyed as stated, and demanded judgment for $1,290, with interest

and costs. The defendant pleaded the statute of limitations. The court said:

> "This action was commenced in August, 1895, about fifteen days after the alleged agreement with the defendant, and the conveyance to her were made, and a little more than eight years after her deed to Van Loon was recorded. The execution of the last-named deed was, in effect, the disavowal of the alleged trust for which the title to the land was held, and could not have been otherwise understood, and the statute of limitations then commences to run. * * * An action for relief on the ground of fraud must be brought within five years after the cause of action accrued to avoid the bar of the statute. We said in *Nash vs. Stevens*, 98 Iowa, 616, that the law does not contemplate actual knowledge of the fraud before the statute begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud; also that, as the recording of a deed imparts constructive notice of its contents, if the facts which a record of a deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. *What was thus said had special reference to creditors; but we are of the opinion that it is applicable to persons interested in the land which is fraudulently conveyed by the deed which appears of record.* * * * The plaintiff is a non-resident of the State, and did not have actual notice of the fraud of the defendant until April, 1892; but these facts did not prevent the running of the statute."

In *Simmons vs. Bagaard*, 30 Fed., 537, the court said:

> "Waring became a bankrupt in 1868. His schedule did not contain any mention of his interest—a vested interest—in these lands. No steps were taken by the assignee to correct this omission. Without doubt, he knew nothing about it; nor was there anything to call his attention to it. But, in 1876, T. S.

Waring executed and delivered a deed to his father, as trustee, in consideration of $1,000. By this deed he conveyed his interest in these lands in fee, in trust for Josephine G. Waring, for life, remainder in fee to his two daughters. The trustee had possession. The deed was placed on record in the proper office. *It gave notice to the world of an adverse claim.* It also gave a right of action to the assignee against the claimant. Under ordinary circumstances, a failure to prosecute this right would bar the assignee after the lapse of two years. * * * This was a fraud upon the assigned estate, and it is maintained that the statute did not begin to run until the discovery of the fraud; that is to say, until assignee was actually informed of it. The general doctrine is recognized in this court. *Bailey vs. Glover, supra.* The rule, however, proceeds upon the idea of concealment by the party setting up the statute, and seeking an advantage therefrom. *Massachusetts Turnpike Co. vs. Field*, 3 Mass., 201. * * * In this case the parties now claiming—that is to say, the trustee, and those for whom he held—made no concealment. They put their deed on record and published their claim. The rule does not apply. The assignee is barred by the statute."

The foregoing cases demonstrate quite clearly that the bill of complaint completely negatives the allegation of concealment contained therein, and also that (assuming that the Government is bound by the same rules, in a case of this character, as an individual, of which we have no doubt whatever) the Government had, from the respective dates of the entry of these lands, constructive and actual notice, urgently calling for action upon its part.

Notwithstanding the Government had issued final receipts for this land, and possibly had issued its patents thereto, it still had an interest in the land, namely, the right to vacate and set aside these patents within the period mentioned in the statute of limitations, for any fraud by which patents

thereto were secured. It was subject to lose this right by lack of diligence, and who will be heard to say that the constructive notice of the Government of the facts set out in the bill of complaint, which is in law equivalent to actual notice thereof, would not arouse the suspicion of any reasonably prudent person and call for investigation?

The defendant was engaged in the mining of coal, and owned lands adjacent to the several entries. Of this the complaint admits the Government had notice. Eighteen private individuals, in rapid succession, make cash coal entries of land adjacent to the lands of the defendant. This likewise appeared from the records of the Land Office. At the very time these cash coal entries were made, plaintiff alleges the defendant was in possession of the land so entered. This the plaintiff is conclusively presumed to have known, in that possession of the lands by the defendant was notice to all the world that it had an interest in said lands, and by most of the authorities, in the absence of investigation upon the part of the plaintiff, conclusive notice of the character of that interest, but in any event sufficient notice to put the plaintiff upon inquiry as to the character of the interest which it claimed therein.

Contemporaneously with the eighteen entries made by these private individuals, each of the entrymen made, executed, and delivered to the defendant deeds of grant, conveying absolute title to the lands entered by them. For the purpose of this case it is presumed, as hereinbefore pointed out, that said deeds were at once placed upon record in the proper county. The record of these deeds was notice to the Government equally efficient in law as actual notice would have been, that contemporaneously with the entries legal title had been transferred to the defendant. Thenceforward, the defendant remained in the possession of the property, mining thereon and selling the coal therefrom.

It seems perfectly clear that under such circumstances as this the Government was called upon to act, for the transac-

tion from its inception, as the same is alleged in plaintiff's complaint, called for action if the plaintiff intended to preserve its rights, and who can doubt that if the Government had proceeded to protect itself by an investigation the true situation would have been readily disclosed, at least as readily and easily disclosed as it was in 1916, since, as we have heretofore shown, nothing is alleged to have transpired between the respective dates of the entries and November, 1916, that had not transpired long before the statute of limitations had run against the Government, and that the same effort to discover the alleged fraud within the statute would have led to the same result that was reached twenty years thereafter?

But laying out of view, for a moment, the question of constructive notice by the record of the deeds and the possession and apparent ownership of the property by the defendant, and yet we must reach the same result. The slightest diligence upon the part of the plaintiff would have resulted in actual knowledge of these two circumstances at any date subsequent to the making of the entries, and nothing but the grossest negligence prevented the acquisition of this knowledge.

During this entire period of time special agents of the Interior Department were stationed in the district of Wyoming, and attached to the United States Land Office therein situated. This was true of every land office in the West. The Congress of the United States had provided the funds necessary to protect the public lands of the United States from fraudulent entry and appropriation, and the Secretary of the Interior, under the authority vested in him, had supplied men in abundance to carry out this work.

These lands lay within close proximity to the United States Land Office at Cheyenne, Wyoming. The manner of these entries, and their proximity to the coal properties of the defendant, were alone sufficient to create more or less suspicion in the minds of the officials of the Government. The slight-

est inquiry or attention to this matter would have led to the discovery that the defendant, at the date of these entries, was actually in the possession, and that thereafter, continuously, it remained in the possession and in the working of these properties. This actual knowledge would unquestionably charge the Government with knowledge also of the title under which the defendant held, and thereby call upon the Government to investigate the nature thereof, for such possession, commencing before and extending from the date of the entries, and thereafter, continuously, would be sufficient notice of the fraud charged to call for investigation. The date of the transfer of this title would have been disclosed at once to the Government by the investigation of the records of the county clerk and recorder's office. Diligence, altogether apart from the question of constructive notice, called for such an investigation.

In *Teall vs. Slaven, supra,* Judge Sawyer, after discussing the question of constructive notice of the violation of a trust by the record of a deed, on page 780 said:

> "In this, and in all other of the United States, the statutes provide for recording all instruments of conveyance. These laws are presumed to be known by all who are affected by them, and they are in fact, known to all citizens having the slightest degree of intelligence. A storehouse of information is here provided by law, open to all. These conveyances were, in fact, recorded as required by law, almost thirty-two years ago—nearly a third of a century. The record was open to the examination of the complainants, and if not constructive notice binding upon them, whether they examined it or not, they knew that if Teall or Devine had a title to these lands, that the title to them must be on the record, and that they could find it readily by looking for it; and when found, it would have given them in fact that same information—actual information—that in law it communicated to the defendants whether they examined it or not. In order to avoid the inconvenience of the actual notice

and relieve themselves from the embarrassment of possessing the same knowledge, in fact, as that imposed by law upon the defendants as purchasers, complainants take pains to aver, that they were non-residents of the State and had never been in it; and did not know that these two conveyances were in existence and on the records of Santa Clara county till 1887. Now if they made inquiries of all these defendants, and these defendants fraudulently told them, as they allege, that Devine owned all the lands that stood in his name on the record, at, and before the time of his death, and they purchased from him, that representation of itself must necessarily have in fact, by implication, at least, brought to their notice the existence of these conveyances upon the record. At all events, with the knowledge they must have had that titles are required to be recorded, and that these defendants claimed the land, if they did not consult the record, to see what title Teall and Devine had to these lands, they were guilty of the grossest laches and negligence, and were unaccountably inattentive to their own interests. If they did examine it, in person, or by agents, the record afforded them the same clues to fraud that were furnished to purchasers, and if followed up vigorously, and intelligently, it could not have failed to unearth any fraud that in fact existed. If they failed to do this, it was their own fault. As before stated, 'the party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the facts which if followed up diligently would lead to a discovery is, in law, equivalent to a discovery—equivalent to knowledge,' wholly independent, and outside of statutory constructive notice of the contents of a record."

In *Wood vs. Carpenter, supra*, it was said:

"Whatever is notice enough to excite attention, and to put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

In *Burling vs. Newlands*, 39 Pac., page 51, the Supreme Court of California said:

> "Moreover we think that the action is barred by the statute of limitations, and is stale from laches. Of course, the statutory period has run two or three times unless the case is saved by the clause (subdivision 4) of section 338, Code Civ. Proc., which provides that in an action based upon alleged fraud the statute does not commence to run until the discovery of the facts constituting the fraud. This action is founded upon the contract between the Burlings and William Sharron, made on December 24, 1875, which was an executed contract; and the statute commenced to run on that day, except so far as its running was delayed by a want of knowledge of the fraud by which said contract is alleged to have been procured. But 'means of knowledge are the same thing in effect, as knowledge itself.' * * * And one who makes a charge of fraud for the first time, many years after its alleged perpetration, must show that within a reasonable time he has used due diligence to discover it, has followed up circumstances which would have put a prudent man upon inquiry, and has not slept upon his rights until the lapse of time and the death of the parties charged with the fraud have destroyed the means of a full, fair, and satisfactory investigation in a court of justice. Moreover, in such a case, the complaint must state facts from which it will appear to the court that ordinary prudence could not have discovered the fraud within the statutory period. * * * In the case at bar, sufficient facts are not stated to show that the alleged fraud could not, with requisite diligence, have been sooner discovered. There was great opportunity for discovering the fraud, if any such existed, before the contract between the Burlings and William Sharron was made. That contract was not made in a hurry. Sharron's representations, alleged now to have been false, were not immediately accepted as true and promptly acted upon. * * * Ralston, as it appears from the complaint, was widely known in business circles, and had been accredited

with great wealth. It is averred in the complaint that he was perfectly solvent, and that he had real and personal property, which passed to Sharron under the deed, of the aggregate value of $9,000,000. It is averred, also, that he had real property of the value of $6,000,000. If that was the fact, and the Burlings really had a legal claim against Ralston, it is almost beyond comprehension why they did not discover it, if not before the $200,000 contract, at least before the death of William Burling, or before the lapse of the statutory period of limitations. The slightest examination of public records would have put them on the trail of the facts. It does not appear that they demanded an examination of the books, papers, etc., of Ralston. But no discovery was made, and it does not appear that any reasonable efforts were made for a discovery, of the alleged facts upon which this action rests, until ten years after the date of the contract, and until after the death of said William Sharron. And it is averred that then 'the means by which they obtained any information was by inquiring among their friends and acquaintances whether they (said persons) had any information relating to the dealings of said Sharron with said trust estate, and whether they had any information regarding the property which was conveyed by said Ralston to said Sharron in trust, as aforesaid.' *But such means were always within the power of appellants and the Burlings; and there are no sufficient facts alleged to show that the delay is 'consistent with the required diligence.'*"

In *Schruggs vs. Decatur Mineral & Land Co.*, 5 So., 441, the Supreme Court of Alabama said:

"Complainants further contend that the case comes within the operation of the statute, which allows, in actions seeking relief on the ground of fraud, one year after its discovery within which to prosecute the suit. The bill avers that they did not discover the fraud until 1887. Laches will not be imputed until after discovery of their rights. But mere ignorance

> of right, without excusing or explaining its unreasonable continuance, is sufficient. 'Ignorance of right in the party complaining, there being no more than passiveness—mere silence on the part of his adversary—cannot be engrafted as an exception on the statute of limitations without a destruction of its wise policy, and without an encouragement of mere negligence. * * * When the case stated is *prima facie* within the bar of the statute, or offensive to the rule against the enforcement of stale demands, the complainant must positively and distinctly aver the facts and circumstances which constitute an exception to the statute, or which excuse or explain the long acquiescence and delay. No concealment on the part of the grantee is averred. She was merely passive and silent. The deed bears date June 20, 1868, its execution was acknowledged by the grantor on the 6th day of August thereafter, and it was on the same day filed for record in the office of the judge of probate, and duly recorded. It was registered where it was open to public inspection. The complainants, as heirs and distributees, were interested in the estate of the grantor. * * * *If inquiries had been made at any time after the father moved to Mississippi, they could then as easily have ascertained the facts, with more certainty and more probability of proof, which they alleged they subsequently ascertained in 1887.* We concur with the chancellor in his conclusion that the claim is barred by the statute of limitations, and that the demand is stale."

The slightest investigation and reasonable use of the instrumentalities provided by the Government of the United States for the discovery of frauds of this character would have brought home to the plaintiff actual knowlege of the possession of the lands by the defendant, the several conveyances made upon the very dates of entry, or shortly thereafter, the acts of ownership of the defendant over the property, both at the time of the entry of the same and thereafter, and these facts, taken in connection which the proceedings in the land office, the business and coal land ownership of the defendant,

would have called for immediate investigation; and who can doubt that if such investigation had been made the same discoveries would have been made within the period of the statute of limitations as were made without that period of time.

The entrymen, or at least a large portion of them, were doubtless impecunious, otherwise they would have used their own money in making these entries. Doubtless they also all lived in the immediate community where the defendant was carrying on its mining operations, which was a small community. Never having been in possession of this land at any time, any member of that community would have known the fact. The possession and ownership of the property by the defendant, being open and notorious, would likewise have been known to every member of the community. It was open and visible to the eyes of the special agent of the General Land Office. A series of frauds of this character could not have been carried out in a community of this kind without being sufficiently talked about, and sufficiently known to almost every member of the community, to enable the special agents of the Government to obtain, by the slightest inquiry, sufficient evidence to justify action upon the part of the plaintiff, and likewise, inquiry of the entrymen themselves, or of their relatives, members of their families and their friends, would have led unerringly to the disclosures which it is now claimed were made twenty years after these entries were perfected. In any event, so far as appears from the bill of complaint, there is no reason why the Government might not have made these discoveries as readily upon investigation within the period of the statute of limitations as twenty years thereafter, and this being true, and the Government having failed to do so, it is clear that it was at all times wanting in the requisite diligence.

IV.

When the Government seeks to avoid the bar of the statute of limitations, its rights are determined by the same rules as would be the rights of a private litigant.

The contention of the Government that "the self-imposed statute of limitations should be construed strictly and in a restrictive sense, and the rights and public interests should not be prejudiced by the negligence of the officials and agents of the plaintiff," scarcely merits notice.

It is doubtless true that when it is sought to determine whether or not this statute of limitations is applicable to a particular *class* of cases, the language of the statute should be strictly construed. So it was ruled in *United States vs. Whited & Wheless*, cited by the appellant, and this because at common law the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations," and the intent to so bind the United States must be clearly manifest from the language of any statute applicable to the subject.

This is only a statement, in another form, of the universal rule that where it is claimed the common law has been abrogated or abolished by statutory enactment, the language of such enactment must lead clearly and explicitly to such results. But this is not the case here presented. It has been definitely determined, and the language of the statute itself concludes any argument to the contrary, that this statute applies to every suit in equity brought for the purpose of canceling patents issued to public lands.

It is a self-imposed statute, and the United States has declared that it is bound by its terms. Without the application of settled principles governing the construction of exactly similar statutes of limitation, and defining their operation, the Government would not be permitted to offer any excuse whatever for not instituting its suit within the period of time therein limited, and it is by reason of the application

of these settled principles that any suit instituted beyond such time is permitted to be maintained. It has been distinctly ruled that such settled principles are applicable to this statute. It was not intended that only such part of these principles as are favorable to the Government should be applied, and *that* part of the same which is unfavorable to the Government should be held inapplicable.

Claiming the right to toll the running of the statute, by reason of fraudulent concealment, necessarily concedes the right to the defendant to insist that the Government shall have used due diligence in the discovery of the fraud. It is the entire principle which is read into this statute, as in every other statute of limitations, and not an emasculated portion thereof. Any other rule would absolutely destroy the statute, for if the Government is not required to exercise any diligence whatever, and if it be true that a mere failure to disclose or confess the original fraud amounts to a concealment, then it follows that no action by the Government to cancel patents to public lands, fraudulently obtained, would ever be barred by the terms of this statute.

This exact question was presented and decided in *United States vs. Puget Sound Traction, Light & Power Co., supra*, 215 Fed., 441, and was disposed of as follows:

> "It is manifest, therefore, that, unless mere failure to discover the fraud will permit the Government to avoid the bar of the statute of limitations, the bill must be made more definite and certain. The argument in favor of according plaintiff such a right is based upon the rule that laches is not imputable to the Government, and that it is not bound by the negligence of its servants. The most emphatic statements of this rule have been made in cases where there was no self-imposed statute of limitations resting upon the sovereign. * * * The statute herein in question was enacted for the very purpose of binding the Government. By its very terms it compels the Government to suffer by the negligence of its agents or officials. If a patent is obtained fraudulently, and knowl-

> edge of the fraud is possessed by the Government officials within the statutory period, and yet they negligently fail to bring an action to set it aside until after the period has expired, can we say that such negligence is not imputable to the Government? To do so would be to deny the existence or binding force of the statute and to accomplish the repeal of a congressional enactment by the process of judicial construction. The statute is absolute in its terms. It says that actions to annul patents shall only be brought within six years of the date of their issuance. The equitable rule of concealed fraud, qualifying the absolute terms of the statute, was ingrafted upon it by judicial construction. It was, however, the rule as developed, defined and expounded by courts of equitable jurisdiction, which was thus imported into the statute, and not an emasculated and mutilated remnant of that rule; a comprehensive legal principle, not a legal paradox. Equity recognizes no such doctrine as that the statute of limitations will be tolled by mere ignorance unaccompanied by a showing of due diligence or concealment of fraud. How, then, can it be read into the statute as a rule of equity?"

In passing upon this point the court of appeals very correctly said:

> "By the terms of the act of Congress of March 3, 1891, this suit is forever barred unless the court of equity ought to relieve the plaintiff from that bar on the equitable principle which has been stated. The United States accordingly has invoked the aid of the court of equity and of this equitable principle to secure this relief. The equitable claims of a nation or a State appeal to the conscience of a chancellor with the same, but with no greater or less force, than would those of a private citizen under like circumstances, and barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the nation or State voluntarily submits them, by every principle and rule of equity applicable to the rights of a private citizen under similar circumstances."

And in support of this statement, cites the following cases which are directly in point:

United States vs. Stinson, 197 U. S., 200, 204, 205.

United States vs. Detroit Timber and Lumber Co., 131 Fed., 668, 677; 67 C. C. A., 1, 10.

United States vs. Debell, 227 Fed., 775, 779; 142 C. C. A., 284.

United States vs. Chandler-Dunbar Water Power Co., 152 Fed., 25; 81 C. C. A., 221.

United States vs. Midway Northern Oil Co., 232 Fed., 619, 631.

State of Iowa vs. Carr, 191 Fed., 257, 266; 112 C. C. A., 477, and authorities there cited.

For the foregoing reasons, and upon the foregoing well-established principles, we respectfully submit that the decree of the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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